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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 189

HARTFORD ACCIDENT & INDEMNITY COMPANY
AND ÆTNA CASUALTY & SURETY COMPANY,
Appellants,

vs.

DELTA & PINE LAND COMPANY.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

STATEMENT AS TO JURISDICTION.

WM. M. HALL,
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STATEMENT OF JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES UPON APPEAL TO REVIEW JUDGMENT OF THE SUPREME COURT OF MISSISSIPPI.

Hartford Accident & Indemnity Company and Ætna Casualty & Surety Company submit in compliance with Rule 12 of the Supreme Court of the United States the following statement of the basis of the jurisdiction of the Supreme Court of the United States upon appeal to review the judgment of the Supreme Court of Mississippi in the above entitled cause.

A.

Provision Sustaining Jurisdiction.

The statutory provision believed to sustain the jurisdiction of the Supreme Court of the United States is Section

237, amended, Judicial Code, being Section 344, U. S. C. A. Title 28. The Supreme Court of the United States took jurisdiction thereunder of an appeal to the October Term, 1933, in this cause, and reversed the judgment appealed from and remanded the cause for further proceedings not inconsistent with its opinion, and this appeal is from the judgment thereafter rendered on the ground that the court below did not comply with its opinion and mandate.

B.

Statutes of the State of Mississippi the Validity of Which Was Involved.

The statutes of Mississippi the validity of which as applied to the bond sued upon, drawn in question as being repugnant to the United States Constitution, were Sections 5131 and 2294 of the Mississippi Code of 1930, Section 5131 providing, in substance, that "all contracts of insurance on property, lives or interest in this State shall be deemed to be made therein", and Section 2294, that "any change whatsoever in statutory limitations made by contract stipulation would be absolutely null and void". The Supreme Court of the United States held that the application of these statutes to the contract sued upon violated the Due Process Clause of the Constitution.

C.

Date of Judgment and Application for Appeal.

The judgment of the Supreme Court of Mississippi sought to be reviewed, was rendered on the 29th day of April 1940, and the application for appeal was presented on the 22nd day of May 1940, this Statement of Jurisdiction being presented therewith.

D.

Nature of the Case and Ruling of the Supreme Court of Mississippi.

Appellee, Delta & Pine Land Company, suer Appellant Hartford Accident & Indemnity Company, in a Circuit Court of Mississippi, upon a fidelity bond to recover a loss sustained through the fraud of an employee.

Appellant in said bond bound itself "to pay" to Appellee, "within 60 days after satisfactory proof thereof, such pecuniary loss * * * sustained * * * through the fraud * * * committed * * * by any of the employees named upon the Schedule attached * * *, in any position, any where, during the period commencing with the respective dates set opposite the names of the employees in such Schedule, and ending with the termination of the suretyship for any employees by his dismissal or retirement from the service of the employer by the discovery of loss hereunder, or by cancellation by the employer or the Surety".

It was provided therein that "upon the discovery by the employer of any dishonest act on the part of any employee, the employer shall give immediate written notice thereof to the Surety at its Home Office. Affirmative proof of loss under oath, together with full particulars of such loss, shall be filed with the Surety at its Home Office within three months after such discovery", and further, that "any claim hereunder must be duly made upon the Surety within fifteen (15) months after the termination of the Suretyship for the defaulting employee, and no suit, action, or proceeding shall be brought hereunder by the employer against the Surety after the expiration of twelve (12) months after the filing of proof of loss as above required".

Appellee in its declaration alleged that it sustained loss through divers acts of fraud on the part of its Treasurer, one

Harris, committed in Mississippi, during the currency of the bond, and that it had complied with all the terms of the bond and Appellant had refused to make payment of the sum demanded.

Appellant set up in its plea thereto that Appellee had its principal office and was doing business in Tennessee and that appellant had an agency and was doing business in Tennessee and that the bond was made between them there and that it was a Tennessee contract governed by the laws of Tennessee and that full faith and credit must be given thereto in the courts of Mississippi, in accordance with the requirements of Article 4, Section 1; Article 1, Section 10 and Section 1 of the Fourteenth Amendment of the Constitution of the United States, and that there was no statute in Tennessee prohibiting or invalidating the condition or limitation in the contract, to the effect that any claim thereunder must be duly made upon the defendant as surety within fifteen months after termination of the suretyship for the defaulting employee, and that plaintiff did not make claim upon appellant for the loss within fifteen months after termination of the suretyship for Harris, as the contract was canceled and terminated December 31, 1929 and no claim was made until June 22, 1931.

Appellee demurred to that plea as not sufficient in law to bar its action, and assigned as causes, (1) that the construction and validity of the provision of the contract relied upon in the plea, was to be determined by the laws of Mississippi, not by the laws of Tennessee; and (2) that the statute of limitations of the State where the suit was brought governed the time for bringing the action and the contract provision relied upon, violated Section 2294 of the Mississippi Code and the public policy of Mississippi and this court was not required to give full faith and credit to

this provision of the contract by Article 4, Section 1; Article 1, Section 10 or Section 1 of the Fourteenth Amendment of the Constitution.

The Circuit Court sustained the demurrer and appellant declining to plead further, rendered judgment in favor of appellee, after having had damages assessed by a jury.

Appellant appealed therefrom to the Supreme Court of Mississippi and that court held that it was to be conceded that under the decisions of the Supreme Court of Tennessee the provision relied upon was a limitation of liability but that the converse was true in Mississippi and that while the contract was made in Tennessee, the loss was sustained in Mississippi and Code Section 5131 made it a Mississippi contract and the Mississippi laws applicable thereto and the provision relied upon violated Code Section 2294, and accordingly affirmed the Circuit Court's judgment. *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co.*, 169 Miss. 196, 150 So. 205.

Appellant appealed therefrom to the United States Supreme Court, October Term, 1933, and the Supreme Court of the United States held that appellant had a right under said provision, lawfully vested in Tennessee, which Mississippi could not nullify with its statutes, without deprivation of due process, and so to do, construed, as had the Supreme Court of Mississippi, said provision, under the Tennessee decisions, to be a condition of substantial importance, lawful in Tennessee, and going to the obligation of the contract, which was to say that it was a condition precedent, in that compliance therewith was essential to recovery upon the bond, and that appellant's defense of non-compliance set up in its plea which had been demurred to, was sufficient in law to bar appellee's action, and remanded the cause for further proceedings not inconsistent with its opinion. 292 U. S. 143, 78 L. Ed. 1178.

The Supreme Court of Mississippi reversed its former decision and remanded the cause without an opinion to the Circuit Court for further proceedings.

The Circuit Court allowed appellee to file four replications, in three of which it set forth anew and also urged additional grounds for the contention that the contract was a Mississippi contract, governed by the laws of Mississippi, and in the fourth that under the Tennessee decisions, compliance with the provision relied on in appellee's plea as a bar to recovery was not a condition precedent to liability. After demurrers to three of the replications were overruled, issue was joined.

The case was tried to the court without a jury. There was no conflict in the evidence upon any material point. It was agreed that there was no statute in Tennessee that prohibited or made invalid the provision relied upon, and it was undisputed that appellant's suretyship for appellee's employee, Harris, and all of its other employees, was terminated December 31, 1929, and that claim was not made upon appellant until June 22, 1931.

Both sides moved for judgment. The court, in substance, held that the bond was not a Tennessee contract but if it was, that under the Tennessee decisions the provision relied upon was not a condition precedent and compliance therewith was not essential to a recovery and gave appellee a judgment against appellant.

Appellant appealed from that judgment to the Supreme Court of Mississippi and Division B of that court heard the cause and on the 8th day of May, 1939, held in substance and effect, that under the opinion and mandate of the Supreme Court of the United States, the judgment in the Circuit Court should have been for appellant, and pursuantly reversed the judgment of the Circuit Court and rendered judgment for appellant. *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co.*, 188 So. 539.

The court, Division B, thereafter upon appellee's filing a suggestion of error, to the effect that the court had based its holding upon the matters set up in the three replications referred to and had not passed upon the matter set up in the fourth replication, remanded the cause to the docket for argument before Division A of the court. Division B thereafter, before argument of the cause to Division A, set aside its judgment for appellant.

After argument of the cause before Division A, the court in banc, with Justice Ethridge, Presiding Justice of Division B, dissenting, held in substance and effect that under the Tennessee decisions, the provision relied upon by appellant in its plea was not a condition precedent and that compliance therewith was not necessary to a recovery, and that that proposition was not in issue and was not involved in the matters considered by the Supreme Court of the United States and was not decided by that court, and accordingly affirmed the judgment of the Circuit Court and entered judgment against appellant and its appeal surety, Aetna Casualty & Surety Company. Justice Ethridge in his dissenting opinion held, in substance and effect, that the proposition in question was before the Supreme Court of the United States and had been decided by that court and that its decision was the law of the case and was binding upon the Supreme Court of Mississippi and it had acquiesced therein, when it reversed its formed judgment and remanded the cause without any further opinion, to the Circuit Court for trial in accordance with the opinion and mandate of the Supreme Court of the United States.

Appellant's present appeal from that judgment to the Supreme Court of the United States, involves the question whether the Mississippi courts complied with the opinion and mandate of the Supreme Court of the United States.

E.

Cases Sustaining Jurisdiction of the Supreme Court of the United States.

The following cases are believed to sustain the jurisdiction of the Supreme Court of the United States upon this second appeal, to review the judgment of the Supreme Court of Mississippi rendered April 29, 1940: *Chaffin* v. *Taylor*, 116 U. S. 567, 29 L. Ed. 727; *Re Blake*, 175 U. S. 114, 44 L. Ed. 94; *Georgia Railway & Electric Co.* v. *City of Decatur*, 297 U. S. 620, 80 L. Ed. 925.

In *Georgia Railway & Electric Co.* v. *City of Decatur, supra*, the Court not only indicates that a second appeal gives jurisdiction of the cause to review the State Court's final judgment, to determine whether it is consistent with its opinion and mandate, but also where it had announced a construction of its own, the State court's contrary construction would not be a compliance with its opinion and mandate.

WM. M. HALL,
Counsel for Appellants.